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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(El Dorado)

THE PEOPLE,

Plaintiff and Respondent,

v.

KENNETH LEE AMES,

Defendant and Appellant.

C057882

(Super. Ct. No. P07CRF0079)

Defendant Kenneth Lee Ames appeals from his convictions for corporal injury on a cohabitant, dissuading a witness by force, obstruction of a telephone line, misdemeanor possession of a firearm and misdemeanor attempted destroying evidence. On appeal, he contends he was denied his right to counsel, because defense counsel had a conflict of interest. We shall affirm.

STATEMENT OF FACTS

Defendant and Debra¹ had been dating for approximately four years and lived together for approximately two of those years. The two had a relationship filled with domestic violence.

In June 2004, defendant and Debra had an argument during which defendant shoved Debra into a rocking chair, grabbed her arm and ripped the telephone cord out of the wall when she tried to call 911. Debra's back, bicep and shoulder were bruised.

On February 26, 2005, defendant told Debra to leave their home and called the police. After he called the police, he pushed her against a bar, choked her, took her keys and threw them at her and said he wished he could kill her. Her chest, neck and arm were scratched and red.

On November 6, 2006, defendant and Debra had the fight that led to the charges in this case. Defendant had called Debra and told her to come home. When she got home, he started yelling at her, calling her names and grabbing her. Then he said he could not "take this no more," he wanted to be dead and held a gun under his chin. When Debra tried to call 911 on her cell phone, defendant choked her and tried to wrest her phone from her. They fell to the ground; he got the phone from her, broke it in half, and threw it. As Debra tried to leave in her car, he held the gun to her head and told her "I don't want you to leave at this time." He also told her the gun was loaded. He tried to

¹ We use the victim's first name only for privacy purposes.

get the keys out of the ignition, popped the hood of the car and tried to disable it. Eventually Debra got the car started, went to a friend's house and called the police.

Defendant admitted to police he had a gun, had fired it in the air, had broken Debra's phone to prevent her from calling the police and had grabbed her from behind. Defendant denied he had choked Debra or pointed a gun at her.

On December 15, 2006, defendant gave Debra a letter in which he apologized for his behavior. In the letter, he admitted pointing the gun at her, wished he had killed himself and claimed the incident was caused by his drug abuse.

Debra and defendant continued their relationship and on December 29, 2006, got into another argument, this time about money. This argument also degenerated into a physical fight when defendant slapped Debra and choked her. Debra got away from him, but as she was leaving, he threw a candle at her and it hit her in the head. She had neck pain and a gash in her head from this altercation.

Defendant testified at trial. He admitted throwing the candle. He told Debra's daughter he had thrown the candle at Debra, but told police he had aimed for the television set.

In May or June 2007, defendant left a message on Debra's cell phone threatening her and the police officer helping her, saying that he would "kick[] both of [their] asses, and if [Debra] wanted problems, he'll give them to [her]."

Defendant admitted he and Debra argued on November 6, that he broke her cell phone, tried to restrain her by grabbing her

from behind and tried to disable her car engine. He also admitted holding a gun under his chin and saying he did not want to "live like this no more." He denied hitting Debra, choking her or pointing a gun at her. As to the December 29 incident, defendant claimed Debra got angry when he refused to give her money to buy methamphetamine. She began throwing things around the room as the two argued. Defendant got mad, picked up a candle and threw it at the television set. Defendant admitted that in 2005 he had been drinking heavily after his mother had died, that he and Debra had argued, and that he might have slapped her. He denied ever having choked her.

Chris Bodenhamer, Wendy Hiestand and John Hiestand testified on defendant's behalf. Bodenhamer had known Debra for five years and had let her live with him for a couple of weeks. In that time Debra "went through the whole house" and "borrowed" things without asking. The Hiestands both testified Debra was aggressive. John Hiestand testified defendant was not aggressive.

PROCEDURAL HISTORY

Defendant was charged with two counts of corporal injury on a cohabitant (counts I & VII), assault with a deadly weapon (count II), two counts of assault by means of force likely to produce great bodily injury (counts III & VIII), dissuading a witness by force (count IV), obstruction of a telephone line (count V), misdemeanor possession of a prohibited firearm (count VI), and misdemeanor destroying evidence (count IX). It was further alleged as to count II that defendant had used a

firearm, as to counts I through III that the victim was a witness, as to counts I, III, IV and V that defendant was armed with a firearm, and as to counts VII and VIII that defendant committed the offenses while released on bail.

Prior to trial, the district attorney filed a motion for a hearing to determine conflict of interest regarding defense counsel, James Clark. The motion alleged that Clark had previously represented Debra in a driving under the influence (DUI) case and a drug case, that he represented her through resolution of those cases and that she had gone to his office multiple times to discuss the cases. Clark's representation of Debra occurred in October and December 2002. Because Debra was a material witness in the case, and the district attorney was also concerned Clark intended to impeach Debra with her alleged drug use, the district attorney sought a determination from the court on whether a conflict existed.

A hearing was held on the conflict of interest issue. Clark indicated he only vaguely remembered representing Debra in the past. He stated that on the drug case, he believed the charges were dismissed and he could not recall the underlying facts of the case. As to the misdemeanor DUI case, he indicated he was in court, saw Debra at the arraignment and offered to represent her. He had no independent recollection of that case, but that was what defendant had told him as related to defendant by Debra.

Clark also stated he had discussed the conflict issue with defendant, who had been his primary client over the years, and

defendant wanted Clark to continue to represent him. Clark did not believe there would be any conflict in his representation and that he would not have to "pull my punches, because I just can't recall any material to either lay a right-cross on her or not." Clark did not believe there had been a substantial relationship with Debra. The court found there was no substantial relationship and no conflict.

The court then took waivers of any conflict from defendant. The court advised defendant that Clark had previously represented Debra, the primary witness against him. The court explained that Clark had a continuing duty of loyalty to Debra to keep certain material confidential, and that meant there was a possibility Clark would "have to pull a punch or two because of this previous representation" and that defendant would have to agree that he would "live with that if it does come up." Defendant indicated he understood that and even understanding that, having been made aware of the dangers of the prior representation of Debra, and the fact he was entitled to a different, conflict-free attorney to represent him, he wanted Clark to continue to represent him.

The court reserved the right to revisit the issue, but found there was not a conflict requiring Clark's removal from the case. Specifically, the court found the contact between Clark and Debra was not substantial and would not likely impact Clark's representation of defendant. The court further found defendant had been advised of the potential drawbacks and

understood them, and waived any conflict in having Clark defend him.

The matter proceeded to jury trial. The jury found defendant guilty of one count of corporal injury on a cohabitant, dissuading a witness by force, obstruction of a telephone line, misdemeanor possession of a firearm, and misdemeanor attempted destruction of evidence. As to the dissuading a witness charge, the jury found the firearm enhancement true; as to the corporal injury count, the jury found the firearm enhancement not true. The jury was hung on the remaining counts and a mistrial was declared as to those counts.

Defendant was denied probation and was sentenced to an aggregate term of five years in prison.

DISCUSSION

Defendant's sole contention on appeal is that Clark had a conflict of interest which prevented him from providing adequate representation and that his waiver of the issue was ineffectual. We disagree.

"A criminal defendant is guaranteed the right to the assistance of counsel by the Sixth Amendment to the United States Constitution and article I, section 15 of the California Constitution. This constitutional right includes the correlative right to representation free from any conflict of interest that undermines counsel's loyalty to his or her client." (*People v. Doolin* (2009) 45 Cal.4th 390, 417 (*Doolin*).) A conflict arises when an "attorney's loyalty to, or

efforts on behalf of, a client are threatened by his responsibilities to another client or a third person or by his own interests. (See generally ABA, Model Rules Prof. Conduct (1983) rule 1.7 and com. thereto)" (*People v. Bonin* (1989) 47 Cal.3d 808, 835 (*Bonin*).) This includes a situation where "an attorney represents a defendant in a criminal matter and currently has or formerly had an attorney-client relationship with a person who is a witness in that matter." (*Ibid.*)

Conflicts of interest claims are a category of ineffective assistance of counsel claims. Under *Strickland v. Washington* (1984) 466 U.S. 668, 694 [80 L.Ed.2d 674], "a defendant [has] to show (1) counsel's deficient performance, and (2) a reasonable probability that, absent counsel's deficiencies, the result of the proceeding would have been different. [Citations.] In the context of a conflict of interest claim, deficient performance is demonstrated by a showing that defense counsel labored under an actual conflict of interest '*that affected counsel's performance--as opposed to a mere theoretical division of loyalties.*' [Citations.]" (*Doolin, supra*, 45 Cal.4th at pp. 417-418, original italics.)²

² The *Doolin* case, which makes clear that the federal and California standards for analyzing conflict of interest cases are the same, was published shortly before briefing was completed in this case. *Doolin* expressly disapproves of earlier cases "to the extent that they can be read to hold that attorney conflict claims under the California Constitution are to be analyzed under a standard different from that articulated by the

Upon learning of a possible conflict of interest by defense counsel, the court is required to inquire into the matter and to act in response to the information revealed in that inquiry. Such action may include ascertaining whether the defendant wishes to waive the right to be represented by conflict-free counsel. (*People v. McDermott* (2002) 28 Cal.4th 946, 990.) The defendant may then choose to discharge conflicted counsel or “waive his right to the assistance of an attorney unhindered by a conflict of interests.” (*Bonin, supra*, 47 Cal.3d at p. 837.)

As with the waiver of other constitutional rights, such a waiver must be a “knowing, intelligent act[] done with sufficient awareness of the relevant circumstances and likely consequences” . . . [and] must be unambiguous and “without strings.” [Citations.]” (*Bonin, supra*, 47 Cal.3d at p. 837.) “Before it accepts a waiver offered by a defendant, the trial court need not undertake any ‘particular form of inquiry . . . , but, at a minimum, . . . must assure itself that (1) the defendant has discussed the potential drawbacks of [potentially conflicted] representation with his attorney, or if he wishes, outside counsel, (2) that he has been made aware of the dangers and possible consequences of [such] representation in his case, (3) that he knows of his right to conflict-free representation, and (4) that he voluntarily wishes to waive that right.’

United States Supreme Court.” (*Doolin, supra*, 45 Cal.4th at p. 421, fn. omitted.)

[Citations.]” (*Ibid.*) Contrary to defendant’s argument, his waiver unequivocally meets these requirements.

The record makes clear defendant and Clark had discussed Clark’s prior representation of Debra, as defendant himself reminded Clark of the particulars of that representation. It is equally obvious that defendant was aware of the specific nature of Clark’s prior representation of Debra. Not only did he remind Clark of the representation, but the nature of the representation was discussed fully during the hearing. It is also clear from the record that defendant was advised of the potential drawbacks and possible dangers of being represented by potentially conflicted counsel. Clark referenced the issue of having to “pull his punches” with Debra, and the specific issue of impeaching Debra with regard to her drug use was also discussed. In taking his waiver, the court advised defendant that Clark had a duty of continuing loyalty to Debra and might be prohibited from using certain information against her, that there was a potential drawback of Clark having to “pull a punch or two” or perhaps being unable to cross-examine Debra as vigorously as he might otherwise and that defendant was entitled to conflict-free representation. After the court assured itself that defendant was aware of and understood these issues, defendant then clearly indicated his desire to have Clark continue as his counsel. This waiver entirely fulfilled the requirements set forth in *Bonin*.

Defendant argues his waiver was not valid because he was not asked if he wanted to speak to outside counsel. *Bonin* does

not require such an inquiry. *Bonin* requires that the court assure itself that the “‘defendant has discussed the potential drawbacks of [potentially conflicted] representation with his attorney, or if he wishes, outside counsel[.]’” (*Bonin, supra*, 47 Cal.3d at p. 837.) The court here assured itself of that. The potential drawbacks were laid out for defendant by both Clark and the court. Defendant gave no suggestion he was interested in speaking with outside counsel.

Without citing any authority for the proposition, defendant also contends his waiver was invalid because no waiver was obtained from Debra. There is no authority to support this proposition and certainly no requirement in *Bonin* for a waiver from anyone other than the criminal defendant.

Defendant’s waiver of his right to conflict-free representation was an effective, knowing, intelligent and voluntary waiver.

Even in the absence of this valid waiver, however, we would not find error. Defendant must show “[a]n ‘actual conflict,’ [which] for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel’s performance.” (*Mickens v. Taylor* (2002) 535 U.S. 162, 172, fn. 5 [152 L.Ed.2d 291, 304].) “[U]ntil a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance.” (*Cuyler v. Sullivan* (1980) 446 U.S. 335, 350 [64 L.Ed.2d 333, 347].) “[T]he [mere] possibility of conflict is insufficient to impugn

a criminal conviction." (*Ibid* [64 L.Ed.2d at p. 348].)

Defendant has not established an actual conflict.

Clark represented Debra in October and December 2002. The alleged prior bad acts in this case occurred in 2004 and 2005, and the events resulting in the charges in this case occurred in late November and December of 2006. Thus, Clark could not have obtained any confidential information relative to the facts of this case or of defendant's prior bad acts by virtue of his prior representation of Debra. Clark indicated his representation of Debra had been minimal and he had obtained no confidential information from or about her in the course of that representation. Clark also disclaimed any possible conflict or the risk that he would be required to pull punches with Debra. We may reasonably rely on counsel's disclaimer in this regard. (*People v. Lawley* (2002) 27 Cal.4th 102, 146.)

Further, defendant's claims that the alleged conflict affected counsel's performance are unpersuasive and speculative. Defendant claims "[a]gainst the overwhelming mass of evidence against his client, Clark offered 3 witnesses, 2 of whom were character witnesses, none of which were experts, and Ames['s] own testimony in which Ames admits almost every material element of the prosecution's case."

Defendant, however, does not explain what more Clark could have done to counter the prosecution's evidence or how Clark's prior representation of Debra inhibited the defense. "We cannot evaluate alleged deficiencies in counsel's representation

solely on defendant's unsubstantiated speculation.'" (*People v. Bolin* (1998) 18 Cal.4th 297, 334.)

Furthermore, the record belies a claim that Clark's prior representation of Debra hamstrung him in his approach to the case. Clark's cross-examination of Debra was thorough, particularly in regard to impeaching her with her previous preliminary hearing testimony and statements made in police reports. He also delved into issues of Debra's drug use and addiction and its impact on her perceptions. On this record, we cannot discern any actual conflict based on Clark's prior representation of Debra.

DISPOSITION

The judgment is affirmed.

CANTIL-SAKAUYE, J.

We concur:

RAYE, Acting P. J.

BUTZ, J.